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CURRENT TOPICS.

Hull v. Bartlett is a recent decision of the Connecticut Supreme Court of Errors, illustrating the rights and duties of an officer charged with the service of legal process in a civil proceeding. The facts were as follows: The defendant Bartlett, at the time, was deputy sheriff; a lawful writ of summons had been placed in his hands to be served on Mrs. Hull, who, knowing that service was about to be made upon her, fled from town to town, and hid herself in many ways and places, resorting to extraordinary expedients and subterfuges to elude the officer. At last the defendant traced her, as he believed, to the house of one Viets, where, upon inquiry, he was told that she had left in the morning. Permission to search was for a time denied, but afterwards granted; but she was not found in the house. Finally, the door of a small outbuilding was discovered fastened. But no response could be obtained from any person within, after repeated calls. At last the defendant (having first obtained permission of the owner for that purpose) forced the door and found a woman lying on the floor with her head and face closely wrapped to prevent identification. The defendant repeatedly requested her to uncover her face in order that he might know who she was, stating his business. But after waiting long, she still kept her position and the covering over her face. He then, as gently as possible, raised her up and uncovered her face for the mere purpose of identifying her, that he might complete the service and make truthful return upon the writ.

"Under the circumstances of this case," the court proceeded to say, after stating these facts, "will the law justify an act on the part of the officer which would otherwise constitute an assault and battery? It was the officer's duty, and he had a right to make personal service of the writ, and in the performance of this duty the plaintiff had no right to obstruct or resist him. If she did so, the defendant had an undoubted right to

use all the force necessary to overcome such obstruction or resistance. *Hager & Wife v. Danforth*, 20 Barb. 16. The right to overcome with necessary force all active resistance is clear, but is there the same right to overcome, by the same means, mere passive resistance? We think not. It is obvious that the plaintiff could do, or omit to do, many things to delay, hinder and embarrass the service of a writ not only with impunity, but without giving the officer any right to use force. She could flee from town to town and hide herself. She could make identification difficult by change of dress, by cutting or dyeing her hair, or blacking her face, or wearing a mask or a veil. The law must declare the circumstances and occasions when an assault is justifiable. It would not do to leave it to the jury to determine whether the conduct was reasonable unless the law first declares it to be a case for the use of such force.

There are no authorities that determine the precise question that controls this case. It must be settled by the analogies of the law, and in such manner as to secure those immunities and rights which the law holds most precious. Suppose Mrs. Hull had fled before the officer and had entered her own dwelling-house, closing after her the outer doors; the law surely would have said to the officer 'thus far and no farther,' but the dwelling surely is not more sacred than the person of the dweller. The law has given every one an inherent right to immunity from interference with or injury to his body at the hands of any other person. The exceptions where an assault is justifiable are all founded on the highest necessity. We do not think the mere importance of identifying a person for the service of civil process comes up to the spirit and reason of any of the recognized grounds for justifying an assault."

If views which are so strongly sustained by reason, common sense and logic, as those which from time to time, for nearly a year past, we have expressed upon the subject of the late lamented proposed amendment to the Constitution of Missouri, need any additional vindication of their soundness, they have it in the result of the recent election as officially announced. From

this it appears that while 81,146 votes were cast for the amendment, no less than 142,747 were cast against, being a clear majority of no less than 58,601 in favor of the correctness of our judgment. This indorsement is more than sufficiently gratifying to our vanity.

DEDICATION.

A dedication is an appropriation of property to some proper object, in such a manner as to conclude the owner. It is an act by which the owner of the fee gives the public an easement in his lands.¹ The fee remains in the grantor.² No particular form is necessary to make a dedication; it may be either by express grant, by parol, or may be implied from the acts of the owner.³ It is essential to a dedication, that the owner should intend what he does as a dedication; and this must be found affirmatively by a jury to constitute it such.⁴ All that is necessary is the consent of the owner, upon the faith of which there has been a public use. If the dedication is clearly proved, no particular length of time is necessary to acquire rights by use; the dedication takes effect on acceptance by the public; and acceptance may be presumed from an actual user.⁵

A dedication may be presumed from a continued use by the public, with the assent of the owner, for such a length of time that an interruption would materially affect the public accommodation or infringe upon private rights.⁶ The question whether land has been

dedicated to public use is one of interest, and where the acts may be referred to the owner's private convenience, it will not be construed a dedication.⁷ Thus, the omission by the owner to fence in a parcel of land or flats, bounding on the sea or salt water, and the occasional use of it by all persons having occasion to land wood and other articles thereon, does not prove a dedication of it to the public.⁸ And where a space is left open in private property bordering on a highway, for the accommodation of the owner, but over which the public are allowed to pass, it is not thereby dedicated to the public.⁹ So, the erection of a church for a religious society does not dedicate it; the owner may sell it if he pleases. To effect such a dedication, there must be a donation by the owner, or some unequivocal act united with an intent to divest himself, to some extent, of the ownership or power of control over the property, and to vest an independent and irrevocable interest in some other person or body.¹⁰

The essence of a dedication to public use is, that it shall be for the use of the public at large.¹¹ The public, and not merely a public corporation, must be the chief beneficiary.¹² But the dedication of land for the use of a limited portion of the public, as for a burial place or training ground, is valid as a charitable use.¹³

ment is not necessary to perfect the presumption. *Schneley v. Commonwealth*, 38 Pa. St. 29. A mere silent acquiescence of the owner of land, in the use of a public road across it, for any period less than twenty-one years, is not conclusive proof of a dedication thereof to the public use, but only evidence more or less significant, tending to prove such dedication. *Penquit v. Lawrence*, 11 Ohio St. 274.

¹ *Biddle v. Ash*, 2 Ashm. (Pa.) 211.

² *Green v. Chelsea*, 24 Pick. 71; *Morse v. Ranno*, 32 Vt. 600.

³ *Gowen v. Philadelpha Exchange Co.*, 5 Watt. & S. 141.

⁴ *Attorney-General v. Merrimack Co.*, 14 Gray, 586, 604. The essence of a dedication is that it shall be for the use of the public at large; there can be no dedication, properly speaking, to a private use. *Meth. Epis. Church v. Hoboken*, 33 N. J. 13.

⁵ *Methodist Episcopal Church v. Hoboken*, 33 N. J. 13.

⁶ *Todd v. Pittsburg, etc. R. Co.*, 19 Ohio St. 514.

⁷ *Mowry v. Providence*, 10 R. I. 52. In a plat recorded under the Iowa Rev. Stat. 608, a square was marked "Church square." It was held that, although this may have amounted to a grant for church purposes, yet that it was not a specific grant conferring the title on the only church then existing in the place, so that future churches might not also have an interest therein. *Christian Church v. Scolte*, 2 Iowa, 37.

¹ *Curtis v. Keesler*, 14 Barb. 511.

² *Mayor of Mason v. Franklin*, 12 Ga. 239; *San Francisco v. Calderwood*, 31 Cal. 585.

³ *Mayor of Mason v. Franklin*, 12 Ga. 239.

⁴ *Harding v. Hale*, 61 Ill. 192; *McWilliams v. Morgan*, 61 Ill. 89; *Bougan v. Mann*, 59 Ill. 492.

⁵ *Bartean v. West*, 23 Wis. 416; *Holdane v. Trustees of Cold Springs*, 23 Barb. 103. To constitute a dedication of land for a highway, the road must be made and accepted by the public; it is usually, if not always, proved by public use and enjoyment. *Curtis v. Hoyt*, 19 Conn. 154; *David v. Municipality*, 11 La. An. 872; *Muzzey v. Davis*, 54 Me. 361; *Oswego v. Oswego Canal Co.*, 6 N. Y. 257; *State v. Carver*, 5 Strobb. 217. So, acts by a town or city, appropriating money or labor in making repairs of a way, manifest an intention to accept a dedication. *Wright v. Tukey*, 3 Cush. 290.

⁶ *Parish v. Stevens*, 1 Oreg. 59; *Mayor of Macon v. Franklin*, 12 Ga. 239; *Case v. Favier*, 12 Minn. 89; *Cady v. Conger*, 19 N. Y. 258; *City of San Francisco v. Scott*, 4 Cal. 114. Twenty-one years adverse enjoy-

No one but the owner of land in fee can dedicate it, or the use of it, to the public. A mortgagor has no such power, as against his mortgagee and those claiming under him, although, as to all other persons, he is regarded as the owner.¹⁴ But if the mortgagee assents to the dedication made by the mortgagor, he will be bound by it, and also those claiming under him.¹⁵ A municipal corporation may make a valid dedication of land belonging to it, as a public street, square or common, which it can not revoke.¹⁶

Two parties are necessary to a dedication, as well as to a private grant; that is to say, there must be some party beneficially interested besides the grantor.¹⁷ But the general rule that the fee can not remain in abeyance, does not apply where property is dedicated to a public use, and where the object and purpose of the appropriation looks to a future grantee, in whom, or in which the fee is to vest, the dedication will preclude the party making the appropriation from re-asserting any right over the land, at least so long as it remains in public use, although there may never arise any grantee capable of taking the fee.¹⁸ The dedication of lands to public uses in cities and town, does not require that they should be incorporated.¹⁹ The public is an ever existing grantee, capable of taking dedications for public use; and its interests are a sufficient consideration to support them.²⁰ When lands are dedicated and enjoyed as such, and rights are acquired by individuals in reference to such dedication, the law regards it as in the nature of an estoppel *in pais*, which precludes the owner of the fee from revoking it.²¹ This application in the case of

a dedication of the use of one's land to the public, as a public common, landing place or highway, where private and individual rights have been acquired in reference to it.²²

A dedication to a pious or charitable use may be effectual, though not distinctly a public one.²³ And if so made that the holder of the estate because a trustee for the purposes of charity, no subsequent conveyance to one having notice could change the use—the grantee would himself become the trustee.²⁴ So, a dedication of land to the public for the use of a burying ground, is valid and can not be revoked.²⁵ Where, by act of the assembly, certain officers were directed to lay off a town on lands of the State, "and to reserve for the use of the State, so so much land as they should deem necessary for a court house, jail and market, for places of public worship and for burying the dead," the city being afterwards incorporated, the rights of the State were by the act of incorporation, vested in it, and the land was to be held for the public use specified, and for such other public uses as the city council should ordain and direct. The city council ordered a part of the land, so reserved, to be sold to pay off the water debt of the city, and a purchaser of the lot proceeded to build on it, when an injunction was applied for, upon the hearing of which the court held that there had been a dedication in the act of laying out the town, of the lands reserved to the public, for the purposes specified, or any other use consistent with such purposes; and that it was in the nature of a contract by which the city held the property, and that it could not be sold for any purpose.²⁶ So where a county received a donation of land for the purpose of laying out a county seat, and a town was accordingly laid out, and a plat thereof filed in the recorder's office, and an order was entered on the records of the county court declaring that certain lots should be held for public use. A court house was af-

¹⁴ Hoole v. Attorney-general, 22 Ala. 190. And after foreclosure, a prior mortgagee in possession may maintain trespass against a street superintendent who interferes with the premises in his official capacity. McManis v. Butler, 49 Barb. 176.

¹⁵ Hoole v. Attorney-general, *supra*; Gentlemen v. Soule, 32 Ill. 271; Bushnell v. Scott, 21 Wis. 451.

¹⁶ Mayor of Macon v. Franklin, 12 Ga. 239; and, the corporation will be restrained by injunction at the suit of any citizen from afterwards selling such land.

¹⁷ Vick v. Mayor of Vicksburg, 1 How. (Miss.) 379.

¹⁸ Kennedy v. Jones, 11 Ala. 63; Proctor v. Lewis-ton, 25 Ill. 153; Indianapolis v. Croas, 7 Ind. 9; Cole v. Sproul, 35 Me. 161; Adams v. Saratoga, etc. R. Co., 11 Barb. 414; Arkenburgh v. Wood, 23 Barb. 360; Abbott v. Mills, 3 Vt. 512; State v. Catlin, 3 Vt. 530.

¹⁹ New Orleans v. United States, 10 Pet. 662; City of Cincinnati v. Lessees of White, 6 Pet. 431.

²⁰ Warren v. Jacksonville, 15 Ill. 236.

²¹ Haynes v. Thomas, 7 Ind. 38; Mankato v. Willard, 13 Minn. 13; Mayor of Macon v. Franklin, 12 Ga. 239.

The dedication of a street or highway to the public does not operate as a grant, but as an *estoppel in pais* of the owner from resuming the exclusive use of his own property, or any use inconsistent with that of the public. Dubuque v. Maloney, 9 Iowa, 450.

²² 2 Washburn Ease. (3d ed.) 185.

²³ Cooper v. First Church, 32 Barb. 222. See Atkin-son v. Bell, 18 Texas, 474.

²⁴ 3 Wash. Real Prop. (4th ed.) 72.

²⁵ Hunter v. Sandy Hill, 6 Hill, 407.

²⁶ Commonwealth v. Rush, 14 Pa. St. 186.

terwards built upon two of the lots, and the place was called "Court House Square," and none of the lots composing the square were ever used for any private purpose. Afterwards the county court made an order appointing a commissioner, and authorized him to sell forty-two feet off of each end of the public square, and, in pursuance of this order, the commissioner sold the lot in question, it was held, upon application, that there had been a dedication to the public, and that a perpetual injunction should issue restraining the sale.²⁷ So where there has been a dedication of a square for the use of public buildings, and, the county seat being removed, the county justices leased the public buildings for private purposes, it was held that there had been a dedication of the square to the use of the public, and that the justices could not appropriate it to private uses.²⁸ And a law authorizing land, which had been dedicated by its owner for the purpose of a public square, to be used for a different purpose, impairs the obligation of a contract, and is void.²⁹ But where a deed conveys land to a town in fee, it will not be construed as a dedication to the public use.³⁰ Land which has been dedicated to the public use, can not be taken as an execution against the municipality.³¹

Probably the most numerous cases of dedication are those where the owners of land in a city or village, with a view to their own as well as the public advantage, lay it out into lots, with streets and avenues intersecting the same, and sell the lots with reference to such streets and avenues. In such cases the original grantor can not afterwards deprive his grantee of the benefit of having such streets or avenues kept open.³² The purchaser is

presumed to pay an advanced price for the anticipated easement, and therefore the original owner has no equitable claim to a remuneration from the public. And the same principle is applicable to a similar dedication of lands to be used as an open square, or for any other proper purpose. This was very fully discussed by the Supreme Court of the United States in the case of *City of Cincinnati v. Lessees of White*.³³ The equitable owners of a tract of land, before they had perfected their title by a patent from the government, laid out a part of it into a town, which now constitutes the City of Cincinnati, upon the plat of which they laid out and designated a part of the land as a public common, or open square, for the use of the inhabitants of the town. This was held to be a sufficient dedication of the land to the public, to vest the title to this common, or square, in the City of Cincinnati, although the city was not incorporated until many years after.³⁴ The statutes of the several States provide that the proprietors of land, who wish to lay it out into town or city lots, shall cause a plat thereof to be made, acknowledged and recorded, on which the lots, streets and alleys are to be particularly described, and which, when so acknowledged and recorded, shall have all the force and effect of an express grant of the lands designated therein as streets, alleys, etc., for the use and benefit of the public.³⁵ Similar provisions for the dedication of lands, are made by the most if not all the States, differing, perhaps, more or less, in the formalities prescribed; but a dedication good at common law is not avoided by a non-compliance with such statute, unless so provided by statute.³⁶ If one owning lands, or having an equitable interest therein, subsequently acquiring the title, lays out a town thereon, and makes and exhibits a map or plan thereof, with spaces marked streets, alleys, public squares and parks, and sells

²⁷ *Rutherford v. Taylor*, 38 Mo. 315.

²⁸ *C. C. Court v. Newport*, 12 B. Mon. (Ky.) 538. The exclusive use of streets, alleys and public grounds, which have been dedicated to the public, can not be transferred to a private individual by a deed executed by the authorities, and approved by all the citizens of the town in which such streets, alleys and public grounds are located. *Alves v. Henderson*, 16 B. Mon. (Ky.) 131.

²⁹ *Warren v. Lyon City*, 22 Iowa, 351; *Leclercq v. Gallipolis*, 7 Ohio, 217.

³⁰ *State v. Woodward*, 23 Vt. 92. Although it be expressed that the land is conveyed for the use of the town as a meeting-house green.

³¹ *President, etc. v. Indianapolis*, 12 Ind. 620, where a square was laid out by the State as a city market place.

³² *Vick v. Mayor of Vicksburg*, 1 How. (Miss.) 379; *Boyer v. State*, 16 Ind. 451.

³³ 6 Peters, 431.

³⁴ *Trustees of Watertown v. Cowen*, 4 Paige, 519; *Huber v. Gazley*, 18 Ohio, 18. Lands dedicated by the record of a town plat as "public ground" is presumed to be intended for a public square, if suitable for that purpose, in the absence of other evidence. *Lebanon v. Warren County*, 9 Ohio, 80.

³⁵ *Canal Trustees v. Havens*, 11 Ill. 554; *Randall v. Elder*, 12 Harr. 257.

³⁶ *Sargeant v. State Bank of Indiana*, 4 McLean, 339. See *Fulton v. Mehernfield*, 8 Ohio St. 440; *Williams v. Smith*, 12 Wis. 594; *Field v. Carr*, 59 Ill. 198.

lots with clear reference to such map or plan, although not recorded, the purchasers of lots in such town acquire, as appurtenant thereto, every easement, privilege and advantage which the map or plan represents as part of the town. Upon the sale of lots with reference to the map or plan, the dedication of the places indicated as streets, public squares, alleys and parks, become irrevocable.³⁷ And if one of them is diverted from the purpose dedicated, as if under a sale from city authorities a house is built on land that is part of the street, this does not authorize the original owner of the tract to sue in ejectment for the lands so built upon. The title of the land is in the public for the use designated, so long as the town exists.

Property dedicated to public uses without any provision for a forfeiture does not revert to the dedicator on a misuser of it; but only where the use becomes impossible of execution. The proper remedy in the former instance would probably be injunction, or an action to enforce a specific execution of the purposes of the dedication. If a street is abandoned by the public *prima facie*, the reversion would be in the owners of the abutting lots, unless the injured grantor had in express terms reserved the right to himself in his deed conveying the lots, or in his act of dedication;³⁸ as, where lands are sold bounded by a highway, the boundary line extends to the center of such highway, unless a contrary intention is clearly expressed from the conveyance.

It does not appear to be well settled as to whether the statute of limitations, as such, will run against the rights of the public in lands dedicated to its use; but although the public can not be technically disseized, yet public as well as private rights may be lost by reason of unreasonable delay in asserting them. So an abandonment by those interested in enforcing such rights, may be infer-

red from circumstances or presumed from long continued neglect.³⁹

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³⁹ Town of Derby v. Alling, 40 Conn. 410; Williams v. First Presbyterian Society, 1 Ohio St. 478. See Mowry v. Providence 10 R. I. 52. A party occupying lands that have been dedicated to the public use can not acquire title thereto, because such lands are, from and the moment of the dedication, out of commerce, and not subject to individual or private ownership. Shreveport v. Walpole, 22 La. Ann. 526.

PARENT AND CHILD.

It has been held that a parent may maintain an action against one who entices away a minor child.¹ But it was held in the case of Commonwealth v. Murray,² that a mother could not maintain an action; yet if the father be dead and she thus become the head of the family, she could doubtless maintain such an action, or where he was alive at the time of the wrong, and died without moving in the matter.³ However, a contrary doctrine has been held in a number of cases.⁴

Where a third person procures, or is instrumental in procuring the marriage of an infant child, neither the parents, nor any one standing *in loco parentis*, can recover against such third person therefor.⁵

A parent can not maintain an action against the teacher of a public school for refusing to instruct his child as a pupil;⁶ but he may maintain an action for the seduction of a

¹ Jones v. Tevis, 4 Littell, 25; s. c., 14 Am. Dec. 98; Vaughan v. Rhodes, 2 McCord, 227; s. c., 13 Am. Dec. 713; Kirkpatrick v. Lockhart, 2 Brev. 276; Sargent v. Mathewson, 38 N. H. 54; Steel v. Thatcher, 1 Wall. 91; Plummer v. Webb, 4 Mason, 389; Cutting v. Seabury, Sprague, 522; Wadell v. Coggeshall, 2 Met. 89; Caughey v. Smith, 47 N. Y. 244; Schouler's Dom. Rel., 3 and 54; 3 Bls. Com., 140.

² 4 Binney, 487; s. c., 5 Am. Dec. 412.

³ Re Ryder, 11 Paige, 185; Gray v. Durland, 50 Barb. 100 (this is a leading case on the subject); Dedham v. Natick, 16 Mass. 135; Hammond v. Carbett, 5 N. H. 501; Mathewson v. Perry, 37 Conn. 435; Freeman v. Van Sire, 56 N. Y. 453, overruling the dicta of the earlier case of Bartle v. Richtmyer, 4 N. Y. 38; Blanchard v. Ilsley, 120 Mass. 487; Parker v. Meek, 3 Sneed, 29. The last case takes extreme grounds, and can not be safely relied upon as authority.

⁴ South v. Dennison, 2 Watts, 474; Bartlet v. Richtmyer, 4 N. Y. 38, overruled by Freeman v. Van Sire, *supra*; Logan v. Murray, 6 Serg. & R. 175; s. c., 9 Am. Dec. 422.

⁵ Jones v. Tevis, 4 Littell, 25; s. c., 14 Am. Dec., 713.

⁶ Spear v. Cummings, 22 Pick. 224.

³⁷ Carter v. City of Portland, 4 Or. 339; Hawley v. Baltimore, 33 Md. 270. Deeds referring to a plat, but given before the grantor acquired title, do not bind him as an act of dedication; but an unequivocal recognition of the map after purchase would operate as an affirmation of the original intention of dedication, and give it full force and effect. Nelson v. City of Madison, 3 Biss. 244.

³⁸ Bayard v. Hargrave, 45 Ga. 342; Evansville v. Evans, 37 Ind. 229; Vest v. Leonard, 34 Iowa, 9; McDunn v. Des Moines, 34 Iowa, 467; Briel v. Natchez, 48 Miss. 423; Wiggins v. McCleary, 49 N. Y. 346.

daughter under age, even though she be at the time in the service of a third party.⁷ And any one standing *in loco parentis* to the party seduced may maintain such an action. If the party seduced be a minor, it matters not where she may reside, if she be legally under the control of, and required to perform services for the party seeking to recover; but if she be not a minor, she must reside with and perform services for the plaintiff. Very slight acts of service will suffice to render seducer liable.⁸ It has been held, however, that the party seduced must be actually in plaintiff's service at the time of the seduction.⁹ Where parent has parted absolutely with the services or control, by apprenticeship or otherwise, he can not maintain an action;¹⁰ but if any portion of services are retained, as where the child assists with the household duties of evenings, a parent can recover.¹¹ Where the person seduced is an adult, the facts of residence and services must be clearly made out.¹² Where a daughter who is over age continues to reside with her father, this is sufficient evidence of services rendered.¹³ No change in relation will be presumed simply because the child has attained its majority.¹⁴

A step-father who stands *in loco parentis* may maintain an action for seduction, because he is invested with all the rights and

subjected to all the liabilities of a natural parent, while occupying such position.¹⁵

Neither the parent nor any one standing *in loco parentis* can recover damages for injury to personal feelings, or for mental anxiety in an action for seduction.¹⁶ It is not requisite that the seduction be followed by pregnancy, in order to render the seducer liable.¹⁷

Where a woman of adult years submits to seduction by or on account of the advice of a third party, that it will be no crime because she is the affianced of the seducer, she can not maintain an action for damages against such third party.¹⁸ It has been held that when a woman has been seduced under promise of marriage, in an action for breach of such promise, she may be allowed fair, liberal compensation for loss of time, virtue and reputation, and for mental suffering and sense of disgrace resulting from such seduction.¹⁹

Where a child is injured by a wrongful act of another person, and the parent is put to trouble or expense because of such injury, he can recover for the same;²⁰ or if the injury occasion loss of services.²¹

It has been held that a minor is liable in damages for an injury inflicted and its consequences, even when done in sport.²²

An adopted child inherits from its adopted parents the same as one born in wedlock;²³ but adopted parents can not inherit from adopted children as against blood relations; the property must follow the ordinary laws of descent.²⁴ Not even when the child obtained

⁷ Bolton v. Miller, 6 Ind. 662.

⁸ Ball v. Bruce, 21 Ill. 161; Fores v. Wilson, Peake, 55; Maxwell v. Thompson, 2 Car. & P. 303; Bracey v. Kilbe, 31 Bush. 273; Coon v. Moffett, 2 Pinnington, 583; s. c., 4 Am. Dec. 392; Martin v. Payne, 9 Johns. 387 (a leading case); s. c., 6 Am. Dec. 288; Nickelson v. Stryker, 10 Johns. 115; s. c., 6 Am. Dec. 318; Mulvahill v. Millwood, 11 N. Y. 243; Freeman v. Van Sire, 56 N. Y. 453; Blanchard v. Illsley, 120 Mass. 489; Hamketh v. Barr, 8 Serg. & R. 36; s. c., 11 Am. Dec. 568; Gray v. Dueland, 50 Barb. 190; Clark v. Fritch, 2 Wend. 459; White v. Nellis, 31 N. Y. 405; Terry v. Hutchinson, L. R. 3 Q. B. 599; Wallace v. Clark, 2 Overton, 93; s. c., 5 Am. Dec. 654.

⁹ Bartley v. Richtmyer, 4 N. Y. 38; Irwin v. Devinson, 11 East. 23; Ingersoll v. Jones, 5 Barb. 661.

¹⁰ Dain v. Wikoff, 7 N. Y. 191; Kennedy v. Shea, 110 Mass. 150; Bolton v. Miller, 6 Ind. 662; Ellington v. Ellington, 47 Miss. 239.

¹¹ Rist v. Faux, 4 Best. & S. 09.

¹² Nickelson v. Stryker, 10 Johns. 115; s. c., 6 Am. Dec. 318; Miller v. Thomson, 1 Wend. 447; Briggs v. Evans, 5 Ired. 21; Patterson v. Thompson, 24 Ark. 55; Lee v. Hodges, 13 Gratt. 726.

¹³ Lipe v. Eisenlied, 32 N. Y. 229; Sutton v. Huffman, 3 Vroom, 58; Briggs v. Evans, 5 Ired. 21; Wilhoit v. Hancock, 5 Bush. 567.

¹⁴ Brown v. Ramsey, 5 Dutch. 118; Mercer v. Walmsley, 5 Harr. & J. 27; s. c., 9 Am. Dec. 486; Greenwood v. Greenwood, 23 Met. 369.

¹⁵ 23 Alb. L. J. 162; 11 Reporter, 159.

¹⁶ Wyman v. Leavitt, 71 Md. —; s. c., 11 Reporter, 335; 2 Car. & P. 292; 10 La. Ann. 331.

¹⁷ Abrahams v. Kidney, 104 Mass. 222; Van Horn v. Trueman, 1 Halst. 322; White v. Nellis, 31 N. Y. 405; Knight v. Wilcox, 14 N. Y. 13; Briggs v. Evans, 5 Ired. 16; Keller v. Donnelly, 5 Md. 211.

¹⁸ Jordan v. Hovey, 12 Cent. L. J. 215; Sherman v. Rawson, 102 Mass. 400; Kelly v. Riley, 106 Mass. 359; s. c., 8 Am. Dec. 336; Bank v. Shain, 3 Bibb, 341; Whalem v. Layman, 2 Blackf. 194; Wells v. Padgett, 8 Barb. 292; Saner v. Schulerberg, 33 Md. 288; s. c., 8 Am. Rep. 174; 23 Alb. L. J. 229.

¹⁹ Gierer v. Schultz, 4 Wis. L. News, 99; Leavitt v. Cutler, 37 Wis. 54.

²⁰ Dennis v. Clark, 2 Cush. 347.

²¹ Hammer v. Pierce, 5 Harr. (Del.) 171; Sawyer v. Sauer, 10 Kan. 569.

²² Peterson v. Heffner, 11 Rep. 598; 33 Ind. 531; 29 Barb. 218; Reeves' Dom. Rel. 386, note 2; 3 Cooley's Bl. 120, note 4.

²³ Burrage v. Briggs, 20 Mass. 103; Small v. Roberts, 115 Mass. 260; Barnhizel v. Terrill, 47 Ind. 255; Hale v. Robbins, 10 N. W. Rep. 617.

²⁴ Hale v. Robbins, 10 N. W. Rep. 617; Commonwealth v. Nancrede, 32 Pa. St. 359; Schafer v. Euler, 54 Pa. St. 304; Barnhizel v. Terrill, 47 Ind. 355.

its property originally from the adopted parents.²⁵

No implied contract on part of parent or child to pay board can be inferred from a simple residence in the family; an express promise is necessary to a recovery.²⁶

It is a general rule of law that a parent is responsible for the acts of his child, yet he is not liable in damages for its torts; neither is he liable for its breach of a contract to marry;²⁷ nor will he be held to respond in damages for a seduction by such child.

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²⁵ *Barnhizer v. Terrill*, 47 Ind. 355.

²⁶ *Liddell v. Haating's Ad'mr*, 11 Rep. 305; 48 Barb. 327; 3 Hun, 547; 1 Tucker, 28.

²⁷ *Paul v. Frazier*, 3 Mass. 71; *Jordan v. Hovey*, 12 Cent. L. J. 215.

UNITED STATES—STATUTORY PRIORITY —INSOLVENCY.

BUSH v. UNITED STATES.

United States Circuit Court, District of Oregon.
November 8, 1882.

The priority of the United States under secs. 3466-7 of the Revised Statutes does not attach in the lifetime of an insolvent debtor, unless his property is taken by process of law as in bankruptcy, insolvency or attachment, or he makes a voluntary assignment thereof to a third person for the benefit of his creditors; and a judgment or judgments confessed by such debtor for an amount equal to the value of his assets with intent to hinder, delay or defraud the United States is not such an assignment.

George H. Williams, for the plaintiffs; *James F. Watson*, for the defendants.

DEADY, J., delivered the opinion of the court:

This case was before this court on October 2, on a motion by the district attorney to dismiss the bill of review for want of jurisdiction.

The motion having been denied, the defendant demurred and the cause was argued and submitted on the bill and demurrer.

The first question for consideration is—Had the United States, upon the facts stated and found, a right of priority of payment out of the property of Griswold on January 6, 1879, by virtue of sec. 3466 of the Rev. Stat.? which reads: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes

a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." At this date, it appears that Griswold confessed judgments to sundry persons for an aggregate sum which, together with his indebtedness to the United States and sundry mortgage creditors, far exceeded the value of his assets, and that said judgments, with the exception of the one to the plaintiffs herein for \$348.82, were based upon fictitious claims and confessed with the intent to hinder, delay and defraud the United States in the collection of a claim against Griswold, then in suit in this court, and upon which it obtained judgment against him on July 30, 1879, for \$35,228 and \$2,821.60 costs and disbursements.

Upon this state of facts it was tacitly admitted by counsel and assumed by the court on the hearing of the original case, that the priority of the United States attached to the property of Griswold, subject to the liens of the valid mortgages thereon. It is admitted that the statute giving the priority of payment was not applicable to this case, unless Griswold had made a voluntary assignment of his property; and it is also admitted that he had not done so, unless the confessing of these judgments amounted to such assignments. There is no doubt but that the effect of these judgments by means of the lien they carried, when docketed, unless set aside at the suit of creditors for fraud, was practically to transfer whatever interest Griswold had in the property in question to the plaintiffs therein.

But upon further reflection and examination I am satisfied that they did not amount to or operate as an assignment within the purview of the statute. The latter is only applicable to cases where the debtor's estate, either by his death, legal bankruptcy or insolvency, has passed into the hands of an administrator or assignee for the benefit of his creditors, or where the debtor himself has voluntarily made such disposition of it. It does not apply, then, to a conveyance, assignment or transfer by whatever means accomplished to a real or pretended creditor or creditors, in payment or satisfaction of a debt or claim. There must be, in some way, an assignment of the debtor's property to a third person, for distribution among his creditors, before the statute can be invoked, and then it operates directly upon the assignee by requiring him to pay the claim of the United States first, and making him personally liable therefor if he does not. R. S., sec. 3467. The following authorities bear with more or less directness upon these conclusions: *United States v. Fisher*, 2 Cr. 390; *United States v. Hooe*, 3 Cr. 90; *Conard v. Atlantic Ins. Co.*, 1 Pet. 438; *Bea-ton v. Farmer's Bank of Delaware*, 1 Pet. 132; 1 Kent's Com., 247; *United States v. Canal Bank*, 3 Story, 81; *United States v. McLellan*, 3 Sum. 350; *Conk. Treat.*, 723.

It follows that so much of the decree as pro-

vides that lot 8 in block 10, and the west half of lots 1, 2, 3 and 4 in block 73, in the town of Salem, shall be subject to the payment of the judgment of the United States, after they had been sold on legal process from the State court and before the entry of said judgment, upon the assumption that the priority of the United States had attached thereto, prior to such sale, to-wit: on January 6, 1879, is erroneous, and must be reversed, and a decree entered dismissing the bill as to the plaintiff's in error.

EVIDENCE OF GOOD CHARACTER INADMISSIBLE IN A CIVIL ACTION IN FAVOR OF A PARTY CHARGED WITH FRAUD.

SIMPSON V. WESTENBERGER.

Supreme Court of Kansas, November, 1882.

Evidence of good character and reputation for honesty and fair dealing is not admissible on the part of a plaintiff claiming possession as mortgagee of personal property under a chattel mortgage held by him in an action of replevin, brought by the plaintiff against an officer to recover the possession of property levied upon in attachment proceedings against the mortgagor, when the mortgage is assailed as fraudulent, as against the creditors of the mortgagor.

Error from Leavenworth County.

Edward Stillings, for plaintiffs in error; *William McNeil Clough* and *Lucian Baker*, for defendant in error.

HORTON, J., delivered the opinion of the court. Joseph Westenberg and Simson Loewenthal were partners under the firm name of S. Loewenthal & Co., doing business in Leavenworth City from January 1, 1880, to about the 18th day of January, 1881, at which time they alleged they dissolved, Westenberg claiming that he sold his interest in the firm to Loewenthal for the sum of \$28,473.84, for which, after deducting \$852.84, placed to his credit on general account, he took thirty-six notes of Loewenthal for \$767.25 each, due respectively in two, three, four, five, six, seven, eight, nine, ten, and so on, up to thirty-seven months after date, in alleged settlement of the partnership. On the 14th of November, 1881, he obtained from Loewenthal a chattel mortgage upon his stock of goods in the store at Leavenworth, to secure thirty-four of said notes, and, on the same day, filed the mortgage in the office of the register of deeds of Leavenworth County. He also claimed that he took immediate possession of the property under the mortgage with the consent of Loewenthal. About this time Morse, Shepherd & Co. brought an action in the United States Circuit Court for the District of Kansas against Loewenthal to recover the sum of \$4,141.69, and caused a writ of attachment to issue, which was placed in the hands of the United States Marshal, Benjamin F. Simpson, and thereunder

George F. Sharritt, a deputy United States Marshal, levied upon the goods embraced in the chattel mortgage. Thereupon Westenberg instituted an action of replevin in the District Court of Leavenworth County against Simpson and Sharritt to obtain possession of the goods. He obtained judgment in that court, and it is contended before us that this judgment must be reversed, because the court permitted evidence to go to the jury to prove his good character and reputation for honesty and fair dealing. His counsel claim this evidence was relevant and legitimate, and therefore properly admitted, and refer to 1 Greenl. on Ev. (10th ed.), sec. 54, pp. 76-79, and the cases there cited; especially *Ruan v. Perry*, 3 Caines, 120. It is stated in 1 Greenl. on Ev., *supra*: "And generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it." In the note thereunder it is said: "The ground on which evidence of good character is admitted in criminal prosecutions is this: That the intent with which the act charged as a crime was done is of the essence of the issue; agreeably to the maxim, *Nemo reus est, nisi mens sit rea*; and the prevailing character of the party's mind, as evinced by the previous habit of his life, is a material element in discovering that intent in the instance in question. Upon the same principle, the same evidence ought to be admitted in all other cases, whatever be the form of proceeding, where the intent is material to be found as a fact involved in the issue." The basis of the text and the note seems to be the case of *Ruan v. Perry*, *supra*, where the court held that, "In actions of tort, and especially charging a defendant with gross depravity and fraud, upon circumstances merely, evidence of uniform integrity and good character is oftentimes the only testimony which a defendant can oppose to suspicious circumstances." This doctrine, it is said generally, was recognized by the court in *Fowler v. Etna Fire Insurance Co.*, 6 Cow. 673, and afterwards in *Townsend v. Graves*, 3 Paige, 455-456. If the rule laid down in *Greenleaf*, and supported by the authority of *Ruan v. Perry*, *supra*, controls, then the testimony complained of was admissible. But, on the other hand, if the doctrine attempted to be established in *Ruan v. Perry*, *supra*, and by the text in *Greenleaf*, is not good law, the evidence was not only irrelevant and incompetent, but prejudicial to the opposing parties, and therefore they would be entitled to a reversal of the judgment. It is stated in 1 Whart. on Ev., sec. 47: "Although in criminal cases good character may be proved by the defendant as tending to substantiate the plea of not guilty, yet in civil suits such evidence has been held to be irrelevant. When the question comes whether the defendant has committed a crime, then as a matter of indulgence to one whose life or liberty are at stake, good character, such as would make it improbable that he would have committed the crime in question, may be introduced among the elements

from which the jurors are to make up their judgment. But whether it be because in a civil issue between two private parties, neither has the right to claim such an indulgence from the other, or whether it be because most civil suits grow out of, or may be supposed to grow out of, honest misconceptions of rights, Anglo-American courts have agreed in holding that so far as concerns the proof in civil issues, the character of either party is, as a rule, irrelevant." In reference to *Ruan v. Perry*, *supra*, the author says: "This case is sometimes cited as authority for the position that in actions for tort charging criminality, the defendant may put good character in evidence. In *Fowler v. Ins. Co.*, 6 Cow. 675, and *Townsend v. Graves*, 3 Paige, 455, *Ruan v. Perry* is cited with qualified approval; but it is emphatically repudiated in *Gough v. St. John*, 16 Wend. 646; *Platt v. Andrews*, 4 Const. 493, and *Porter v. Seller*, 23 Pa. St. 424." In *Fowler v. Etna Fire Ins. Co.*, *supra*, cited as supporting *Ruan v. Perry*, the court refer to the latter case, but refer approvingly to *Attorney-General v. Bowman*, 2 Bos. & P. 532, and decide that evidence of general good character is inadmissible by way of defense in a civil action in which a party is charged with a specific fraud; and that in civil actions the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties. In *Townsend v. Graves*, *supra*, also cited by Greenleaf as recognizing *Ruan v. Perry*, the real question before the Chancellor was whether the complainant, who charged the defendant with having fraudulently substituted another number in a package of lottery tickets in the place of the prize ticket, could be permitted, in the first instance, to give evidence of the general bad character of the defendant. The Chancellor decided, as such evidence had no bearing whatever, on the matter in issue in the case, it was wholly inadmissible, and ought not to have been received. In *Gough v. St. John*, *supra*, the defendant was sued in an action on the case for a false representation as to the solvency of a third person. The representation was in writing, and verbal testimony was offered tending to show that the defendant knew it to be false. To rebut this charge, proof that the defendant sustained a good character for honesty and fairness in dealing was offered and admitted. *Cowan, J.*, held that the fraudulent intent was a necessary inference of law from the falsity of the representation, and that the evidence of character was improperly admitted. He cited and condemned the case of *Ruan v. Perry* as favoring the general admissibility of evidence of character in civil actions for injuries to property. The other judges agreed that the evidence was improperly admitted, but said nothing as to the case of *Ruan v. Perry*. They denied, however, that fraud was in such cases an inference of law. In *Smets v. Plunket*, 1 Strohn. (S. C.) 372, it is said: "Evidence of the plaintiff's general character was no doubt intended to show that he was incapable of having first appropriated a por-

tion of defendant's lumber dishonestly, and then rendered a false account of sales; and the evidence tended towards this purpose, if it could have laid bare the heart of the plaintiff and ascertained really the strength of his moral principles, it would have been highly influential. But examinations in court into general character according to reputation, usually distinguish only between the two classes, the good and the bad, without nice discrimination between the infinite degrees and varieties which exist of either class; of most persons there is really no general reputation as to character, and of some the general reputation is widely different from the truth which a full knowledge of their motives, principles and habits would disclose; sometimes, upon trials, the good are overthrown by unexpected assault, and often the bad are burnished and strengthened by the ready testimony which their influence procures in their favor, whilst many of their neighbors who think ill of them, shrink from being examined; or being examined, can not say that the suspicions which they entertain, and which they feel rather than know that others also entertain, have been uttered so as to constitute a bad reputation. In investigations concerning character, feeling and prejudice are more frequently exhibited than in inquiries upon any other subject. The number of witnesses is often extended far beyond the limit which, upon other topics, the court would indulge; and if there be contrariety of opinion, the matter is usually left at last in great uncertainty. These considerations suggest the propriety of adhering closely to the rules which have been established to regulate the admission of the evidence of reputation concerning general character. If in every case where an act of dishonesty is imputed, the imputation may be met by such evidence, then there are few cases into which such evidence might not be introduced. Trials would be insupportably tedious, and the result of a trial would as often depend upon the popularity of a party as upon the merits of his case." Again, in *Wright v. McKee*, 37 Vt. 161, the early case of *Ruan v. Perry* is cited as having been overruled, and as an argument for excluding evidence offered by a defendant to sustain a good character for honesty and integrity in a civil action brought to recover the value of a package of bank bills and silver delivered by the plaintiff to the defendant to carry to a third person, which it was alleged the defendant converted to his own use, the court says: "In criminal cases, the respondent is permitted to introduce evidence of this kind. In civil cases, where the question of character is directly in issue, and material as to the amount of damages as in slander and seduction, it is admitted. This we think is the extent to which it ought to be admitted in civil suits. In criminal cases, the law allows it to the respondent out of tenderness to help him, if it may, in his necessity, as it gives him the benefit of every doubt. And even in criminal cases, the law regards it of value only when the other evidence leaves the case in doubt

and general good character may be fairly invoked to rebut suspicious circumstances. Many considerations concur in rejecting such evidence in civil cases. Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed, and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced. It may then perhaps serve to turn the wavering scales. Very rarely can it be of substantial use in getting at the truth. It is uncertain in its nature, both because the true character of a large portion of mankind is ascertained with difficulty, and because those who are called to testify are reluctant to disparage their neighbors, especially if they are wealthy, influential, popular or only pleasant and obliging. It is mere matter of opinion, and in matters of opinion men are apt to be greatly influenced by prejudice, partizanship or other bias of which they are unconscious. And in cases which are not quite clear, they are apt to agree with the one who first speaks to them on the subject, or to form their opinions upon the opinions of others. The introduction of such evidence in civil cases, wherever character is assailed, would make trials intolerably long and tedious, and greatly increase the expense and delay of litigation. It is a kind of evidence that might easily be manufactured, is liable to abuse, and if in common use in the courts, as likely to mislead as to guide aright. The authorities are quite unanimous in excluding such testimony. It is the settled rule of the common law." In *Connecticut*, in *Humphrey v. Humphrey*, 7 Conn. 116, and in *Norton v. Warner*, 9 Conn. 172; in *Maine*, in *Potter v. Webb*, 6 Greenleaf, 14, and in *Thayer v. Boyle*, 30 Me. 475; in *Pennsylvania*, in *Anderson v. Long*, 10 Serg. & R. 55, and in *Porter v. Seller*, 23 Pa. St. 424; in *Indiana*, in *George v. Drummond*, 7 Ind. 19, and in *Gibbort v. Burkett*, 57 Ind. 378; in *Kentucky*, in *Morriss v. Hazlewood*, 1 Bush, 208; in *Missouri*, in *Gutzwiller v. Lackman*, 23 Mo. 168; in *Iowa*, in *Barton v. Thompson*, 65 Ia. —; in *Mississippi*, in *Lowell v. McDonald*, 58 Miss. 251; and in *South Carolina*, in *Smets v. Plunket*, *supra*, the same doctrine is recognized. See, also, *Attorney-General v. Bowman*, 2 Bos. & Pul. 532, note; 1 Phil. Ev. 467, and *Cowan & Hill's notes thereto*; 1 Starkie's Ev. 366.

From an examination and consideration of the authorities, our deduction in the premises is that the decision of *Ruan v. Perry* has been overthrown; that the rule in *Greenleaf* in regard to the admission in civil actions of evidence of good character in favor of a party charged with fraud is incorrect, and that in actions like the one at bar, such evidence is irrelevant and incompetent. As an excuse for the admission of the evidence concerning the good character of *Westenberger*, it is urged that the counsel representing the defendants below opened his case to the jury with the statement that *Westenberger* and *Lowenthal* were brothers-in-law; that they had been leagued together for twenty years or more for the purpose

of swindling their creditors, and that such counsel upon the trial went back to the years of 1864, 1865, 1866, 1867 and 1868, to show by evidence that *Westenberger* and *Lowenthal* had been partners; that they had failed; that they had made an assignment which was afterwards set aside; that *Westenberger* afterwards went through bankruptcy and was discharged. In the first place, the remarks of counsel to the jury do not appear in the case, and we must decide the questions at issue upon the record. But if counsel had made any improper or irrelevant remarks in the opening of his case, such conduct would not authorize the opposing sides to introduce, against objection, irrelevant and incompetent testimony. And if any irrelevant testimony was offered upon the trial by defendants below, this would not sanction against objection the introduction of opposing testimony of like kind on the other side. But the evidence of *Westenberger's* transactions referred to may have all been relevant and competent as tending to show whether he was the owner of \$28,473.84 of assets in the partnership of *S. Lowenthal & Co.* at the time of the alleged dissolution on the 10th of January, 1881, and therefore as tending to show whether the chattel mortgage assailed, secured an actual indebtedness of the amount named therein. *Wallach v. Wylie*, 28 Kan. 138, s. c., 15 Cent. L. J. 230.

Error is also alleged in the direction of the court to the jury. As plaintiffs in error did not ask for additional instructions, nor indeed for any instruction, and as it seems to be admitted that the instructions given were good law when reduced to abstract propositions, the objection to the charge of the court, under the circumstances, is not sufficient to set aside the verdict and the judgment. On account, however, of the admission of the irrelevant and incompetent evidence touching the character and reputation of *Westenberger* for honesty and fair dealing, the judgment of the district court must be reversed and the cause remanded for a new trial.

JURY TRIAL.—COMPETENCY — INABILITY TO SPEAK ENGLISH.

SUTTON v. FOX.

Supreme Court of Wisconsin, October 10, 1882.

Held, that reasons sufficient for the challenge and exclusion of persons drawn as jurors, may be found outside of the statute; that inability to speak or understand the English language is a sufficient reason; and that such exclusion is so largely in the discretion of the trial court that its action will not be made the subject of revision unless some violation of law is involved, or the exercise of a gross or injurious discretion is shown.

Held, that a law which simply removes the disability of a witness does not impair the right of trial by jury or divest the course of the State of any judi-

cial power vested in them by the Constitution. That it was within the power of the legislature to provide for the admission of evidence of witnesses who are convicts in the State prison.

Appeal from Circuit Court, Green Lake County.

J. C. McKenny and W. G. Vilas, for respondent;
G. W. Hazelton and I. C. Sloan, for appellant.

TAYLOR, J., delivered the opinion of the court:

The appellant assigns but two causes for reversing the judgment rendered against him in this case. First. That four jurors, whose names were drawn from the jury box during the process of impanelling the jury, were set aside by the court on the motion of the plaintiff, for reasons stated in the bill of exceptions; and, second, because the testimony of two witnesses was received on the part of plaintiff, against the objection of the defendant, such witnesses being, at the time their testimony was given, convicts in the State prison, serving out a sentence upon conviction of the crime of arson.

The objection made to the jurors who were excluded, so far as the record discloses, was undoubtedly made upon the ground that their knowledge of the English language was so limited and imperfect as to make it highly probable that they could not intelligently comprehend the proceeding in the course of the trial.

It will be seen from the record that there is no exception taken to the justice of the verdict rendered in the action, nor that any error was committed by the judge in his instructions to the jury, or in his rulings upon the trial as to the admission or rejection of evidence, except as to the evidence of the two witnesses above referred to, nor that the jury which was finally impanelled and sworn, and tried the cause, was not an impartial and fair jury; but the learned counsel for the appellant claims that it was error not to permit the four persons whose names were drawn from the jury box to be sworn and serve as jurors in the case.

The only statutory provisions regulating the selection and impanelling of jurors are the following: Sec. 2524 R. S., "All persons who are citizens of the United States, and qualified electors of the State, shall be liable to be drawn as jurors, except as provided in these statutes." The exceptions are found in sec. 2525. The only part of this section which can have any bearing upon the question before the court reads as follows: "and all persons of unsound mind or subject to any bodily infirmity amounting to a disability" are exempted from serving as jurors. Sec. 2527 R. S., provides for selecting the lists of persons from which the juries to try actions at the circuit court shall be drawn, and sec. 2530 provides that "In preparing such jury list, the several supervisors, trustees, aldermen, and county boards shall select such persons only as they know or have good reason to believe are possessed of the qualifications required by law, and are of approved integrity, fair character, of sound judgment and well informed." Sec. 2540 R. S. directs how the names of the per-

sons to form a trial jury shall be drawn from the jury box. Sec. 2541 reads as follows: "The first twelve persons who appear as their names are drawn and called, and who are not lawfully challenged, and are approved as indifferent between the parties, and not discharged or excused, must be sworn and constitute the jury to try the issue." Sec. 2849 R. S. "The court shall on request of either party, examine on oath any person who is called as a juror therein, to know whether he is related to either party or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection, and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be called and placed in his stead for trial of that cause." Sec. 2851, R. S., provides that each party to a civil action shall be entitled to three peremptory challenges, and no more; and prescribes how and when the challenges shall be made. Sec. 2538 R. S., provides that "When by reason of challenge or otherwise, a sufficient number of jurors, duly drawn and summoned, can not be obtained for the trial of any cause, civil or criminal, the court shall cause jurors, duly qualified, to be returned from the bystanders or from the country at large, to complete the panel for such trial, and the court may in its discretion order a special venire to issue for that purpose, or such jurors may be returned by the sheriff or his deputy, the coroner, or any disinterested person appointed by the court without writ." Sec. 2578, R. S., provides that "all writs, processes, proceedings and records in any court within this State shall be in the English language."

It will be seen that these statutory provisions do not expressly confer upon the trial judge power to exclude from the jury any person whose name is found in the jury box and is drawn therefrom in the way prescribed, except as provided by sec. 2849. The causes for exclusion mentioned in that section are restricted to the relationship of the juror to either of the parties, to the fact that he has formed or expressed an opinion as to the merits of the case, or has some bias or prejudice therein. Clearly this section does not cover the case of a person whose name is placed upon the jury list who is unable to speak or understand the English language, who is not a citizen and an elector, who is exempted from service as a juror for any cause, who is deaf or so sick or infirm as to be unable to sit in the case, who is an idiot or insane, who is afflicted with a contagious or loathsome disease which would make it improper for him to associate with other men; and is drawn as a juror to try a cause in court. Still, it can not be denied that the trial court must have the power to exclude such person from the jury. A construction of the law which would deprive the court of the power to purge the jury of such unfit persons would be monstrous.

It has been frequently held that the causes of challenge enumerated in a statute are not exclusive of all others. It has been well said "that the grounds of challenge for cause are so various that any attempt to collate them in a statutory provision must necessarily be only partially successful. Causes of a most positive character are liable to arise out of the facts of specific cases, which must result in a failure of justice, if the statutory causes only are to be recognized." *Thompson & Merriam on Juries*, sec. 175, and cases cited.

Nor do we understand the learned counsel for the appellant to contend for any such construction. Their contention is that it was not made to appear that the persons excluded by the judge were so ignorant of the English language as to justify their exclusion on that ground. That a juror may be excluded for that cause when it exists, is not denied. To hold otherwise in a court when the law requires that the proceedings shall be in the English language, would be to render the trial by jury a mockery. That such want of knowledge of the English language is a good ground for excluding a juror, has been determined by every court in which the question has been raised, when the law required that the proceedings of the court should be in the English language, unless the statute of the State, either in express terms or by clear implication, provided that such want of knowledge of the English language shall not be a ground of exclusion. *Thompson & Merriam on Juries*, secs. 175, 259; *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *People v. Arceo*, 32 Cal. 40; *State v. Rousseau*, 28 La. Ann. 579; *State v. Gindrv*, Id. 630; *State v. Push*, 23 La. Ann. 14; *State v. Gay*, 25 La. Ann. 472; *State v. Marshall*, 10 Smith's Condensed Reports (Ala.) 240; *Plank Road Co. v. Railroad Co.*, 13 Ind. 90. For reasons peculiar to the people in certain counties in Colorado, it was held by the Supreme Court of that State, that want of knowledge of the English language was not a good reason for setting aside a juror. *Trinidad v. Simpson*, 22 Alb. L. J. 409; 10 Cent L. J. 149. It would seem unnecessary to add authorities to sanction a practice so just and necessary to the proper administration of justice, and which has been recognized and acted upon by all the courts of this State, without objection, from its first organization. As said above, the learned counsel for the appellant do not question the propriety of the exercise of the power in a proper case, but deny that the record discloses any cause for its exercise in this case.

Admitting the power of the court to exclude a juror because of his want of knowledge of the English language, it follows that the power must be exercised in the discretion of the presiding judge, and it would require a clear case of the abuse of the power to call for the intervention of this court. *Thompson & Merriam*, in their work above cited, sec. 258, say: "The rule is well settled that it is the duty of the court to superintend the selection of the jury, in order that it may be composed of fit persons. Large discretion must

be confided to the trial court in the performance of this duty; nor will the action of the court in this behalf be made the subject of revision unless some violation of law is invoked or the exercise of a gross or injurious discretion is shown." A large number of cases are cited by the learned author to sustain this position, and there can be no doubt as to the soundness of the rule stated. The trial judge occupies a place of advantage in determining questions of this kind, which renders it highly improper for this court to overrule the decision of such judge in setting aside a juror, except where it clearly appears, as is said above, that there is some violation of law or the exercise of a gross or injurious discretion is shown. See *Thompson & Merriam on Juries*, sec. 252, and cases cited in notes. That there is no violation of law in setting aside a juror whose name is drawn for the trial of a cause, for other reasons than those set out in sec. 2849, is not disputed. Sec. 2541 Rev. Stat. clearly implies that the court may excuse or discharge persons who are so drawn, notwithstanding they may be approved as indifferent between the parties. We are not prepared to say that it appears from the record that the trial judge in this case exercised any injurious or gross indiscretion in setting aside the four jurors named in the record. But if the record disclosed a state of facts which clearly demonstrated that these persons did sufficiently understand the English language to render them competent and proper jurors in the case, there would still be very grave doubts whether the verdict should be set aside for that cause. From the record it appears that the appellant has been tried by a fair and impartial jury. He has no reason, therefore, to complain, and does not complain of the injustice of their verdict. He simply alleges that he was entitled to be tried by persons whose names are first drawn from the jury box, and who are approved as indifferent between the parties, and who are not excused or discharged for good cause by the trial court. The words "for good cause" are not in the statute, but it is claimed that such must be the interpretation which should be given to it. The causes for excusing jurors, even after their names are drawn for the trial of a case, are so numerous and involve so many considerations which must be addressed to the discretion of the trial judge, that it can not well be interfered with by an appellate court without great danger of embarrassing the action of the trial court and doing more injury than good. We think there are very substantial reasons for holding that the excusing or setting aside even a competent and indifferent person should not be ground for the reversal of a judgment, when the record shows that an impartial jury has been impanelled for the trial of the case. It has been well said "if a new trial be granted for such cause, there is no probability that the persons set aside will be again drawn upon the jury and all the party complaining can have is a new trial by an impartial jury, and that he has already had on the first trial." In the case

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of *State v. Marshall*, *supra*, Justice Ormud says: "Of all the discretionary powers of a court this would seem to be the least liable to abuse, as it is altogether conservative. Its exercise is confined to the exclusion of improper or unfit persons as jurors, and how this could prejudice the accused it is difficult to perceive. If in its exercise the court should reject a person qualified to sit as a juror, how does that prejudice the accused? If a juror disqualified by law is put upon the prisoner, the case would be different; but if he is tried by an impartial jury he has sustained no injury." *Tatum v. Young*, 1 Porter (Ala.) 298; *United States v. Cornell*, 2 Mason, 91; *Com. v. Livermore*, 4 Gray, 18; *Atlas Mining Co. v. Johnson*, 23 Mich. 37; *Ware v. Ware*, 8 Me. 42; *Hurley v. State*, 29 Ark. 17; *State v. Ward*, 39 Vt. 225; *Mauer v. State*, 8 Tex. App. 361; *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257; *Watson v. State*, 63 Iowa, 548; *State v. Dickinson*, 6 Kan. 209; *Stout v. Hyall*, 13 Kan. 232; *R. Co. v. Franklin*, 23 Kan. 74; *Ayers v. Metcalf*, 39 Ill. 307; *John v. State*, 16 Fla. 564; *Dodge v. People*, 4 Neb. 220, 230; *Booming Co. v. Jarvis*, 30 Mich. 308; *Head v. State*, 44 Met. 730-750; *Pierce v. State*, 13 N. H. 536.

The second ground of error alleged by the counsel for the appellant, is that the two convict witnesses were not competent witnesses for the plaintiff, and that their testimony should have been rejected by the court. To sustain this objection, the learned counsel for the appellant have made a vigorous attack upon the constitutionality of sec. 4073 R. S. of 1878, which reads as follows: "A person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer."

The learned counsel for the appellant contend with great earnestness that this section is a violation of the provision of the Constitution which secures a party to a civil action a trial by jury, and the other provision which vests in certain courts the judicial power of the State. Notwithstanding the ingenuity and earnestness of the argument, we are unable to comprehend how a statute which simply removes a statutory or common law disability of a witness, can by any possibility violate either of these provisions of the Constitution. It is no more a violation of the constitutional privilege of a trial by jury than any other law, which removes a disability which excluded a person as a witness at the time the Constitution was adopted, and we are not aware that any law removing such disability has ever been held by any court to violate that provision; nor do we find that any writer on constitutional law has ever suggested that such legislation was a violation of the right of trial by jury. On the contrary all such laws tend to give force to that pro-

vision by enlarging the means of presenting to the jury all the evidence which tends to sustain either the plaintiff's cause of action or the defendant's defense. They give efficiency to that provision rather than defeat it. Nor are we able to understand how the appearance of a convict in court as a witness tends to destroy or lessen the judicial power which the Constitution has vested in it. The witness may be obstinate, or insolent and abusive, and it may be difficult for the court to preserve its dignity or to adequately punish the offender, but such possible inconvenience can not be said to divest the court of any judicial power vested in it by the Constitution. The moral character of a witness was never a test of his competency, although in England and in some of the States of the United States his religious belief was made a test. The thief, the robber, the ravisher and murderer, though convicted of the crimes with which they were charged, if not sentenced, as well as the felon who admitted his guilt, were, at common law, permitted to go upon the witness stand and give their testimony, whilst the man who was deficient in his religious beliefs, or who was interested in the action, was rejected as incompetent. It would seem therefore that a law which abolished the test or religious belief or want of interest as a qualification of a witness, would be a much greater innovation upon the orderly proceedings of a jury trial as the same were conducted in England and those States which had adopted the English rules governing the same, than the law now in question, which simply does away with a disqualification which depended upon a mere technicality. The removal of the disability of religious belief or the disability of interest in the subject matter of the action, has never been held by any court to be a violation of the constitutional right of trial by jury, and no writer upon constitutional law has ever suggested that it was a violation of such right. The man who is confessedly guilty of a felony, or who has been convicted thereof after a fair trial, by the verdict of a jury, is no less corrupt, degraded or unworthy of belief before sentence than he is after; nor is the purity or dignity of the court more offended by his appearance on the stand, after he is sentenced, than before. The convicted felon, who is undergoing the just punishment of his crime, is not a less trustworthy witness than the admitted felon who is put upon the stand by the State with an implied understanding that if, with the aid of his testimony, his associates are convicted, he will escape punishment. The moral influences are certainly in favor of the witness who is under sentence. The earnest and impassioned argument made by the learned counsel for the appellant against the admission of the evidence of witnesses undergoing sentence, would have great force if addressed to the legislature, upon the propriety of the passage of a law making them competent witnesses, but we are unable to discover its force as an argument to prove the want of constitutional power in

the legislature to pass the act. A law which simply removes the disability of a witness does not impair the right of trial by jury or divest the courts of the State of any judicial power vested in them by the Constitution.

The point made by the learned counsel for the appellant that the law properly construed does not cover the case of a convict who is still in prison undergoing punishment, we are clearly of the opinion can not be sustained. The language is general, and was clearly intended to apply to all convicts. If there is any propriety in the law, it certainly should apply to all cases equally. The facts and circumstances of the case at bar, are a vindication of the propriety of the enactment of the law in controversy. Had the evidence of the witnesses who were rendered competent witnesses by this law been excluded, it is highly probable that a great wrong would have gone unwhipped of justice.

The judgment of the circuit court is affirmed.

CONTRACT—WAGER—OPTIONS IN GRAIN.

MURRAY v. OCHELTREE.

Supreme Court of Iowa, October 4, 1882.

A contract for the sale of grain for future delivery is not void as a wager, unless it is shown that neither party intended that there should be any actual delivery.

Appeal from Louisa District Court.

Action upon a promissory note executed by defendants to plaintiffs. The cause was tried to the court without a jury, and judgment was rendered for defendants. Plaintiffs appeal.

Gray & Tucker, for appellant; *Newman & Blake*, for appellee.

BICK, J., delivered the opinion of the court.

1. As a defense to the action, defendants plead "that plaintiffs were commission merchants in Chicago, Illinois, and doing business for the defendants in the sale of grain; and that plaintiffs dealt and traded in what is known as options 'on change,' in Chicago, in grain, by selling and buying in market 'on change' certain grain for future delivery, when in fact no delivery was ever intended or demanded, and no grain was bought or sold, or intended to be; that the whole business was a venture and speculation on 'margins,' depending for profits or losses on the fluctuations of the markets, and purely a fictitious and gambling transaction; that in such trade no consideration was received for money lost and paid, and, when money was received, nothing was paid therefor; and defendants say said note was given for loss in so trading in options, which plaintiffs well knew, and was therefore without consideration, in violation of law, and contrary to public policy." This defense presents the sole issue in the case.

2. A transaction of the character alleged in the answers to be the consideration of the note in suit is illegal, and is not a sufficient consideration to support a contract. But to invalidate a contract on the ground of the illegality of the transaction, it must be shown by a preponderance of evidence that both parties bought or sold property with the knowledge and purpose that no actual delivery of the property which was the subject of sale should be made; or, in other words, both participated in the intention, which, if executed, renders the transaction illegal. If one of the parties acts in good faith, with the intention and expectation of delivering or receiving the property which is the subject of the sale, the transaction as to him will be valid, and will be a sufficient consideration for a contract in his hands based thereon. *Pixley v. Boynton*, 79 Ill. 351.

3. The evidence in this case shows without contradiction, that the transaction for which the note in suit was given was, on the part of plaintiffs, made in good faith, with the purpose of delivering to defendants the grain which was the subject of the sale, and that they made actual purchases thereof with the intention of performing their contract of sale with defendants. Two of the plaintiffs testify positively and directly to this point. The defendants all unite in declaring that it was their purpose to make the transaction an "option deal," but their testimony fails to disclose a like purpose on the part of plaintiffs. One of the defendants uses the following language in his testimony, referring to the transaction: "I know this was an option deal simply, because, so far as I was concerned, I never expected to receive any corn. I do not know whether or not plaintiffs bought the corn or not; I only meant for them to buy an option deal." The testimony of the other defendant is no stronger against plaintiffs upon this point. No witnesses except the parties testified in the case. We may, therefore, declare that the testimony utterly fails to show that plaintiffs participated in any purpose which would invalidate the note, but, on the contrary, the transaction is affirmatively shown by the evidence to have been on the part of plaintiffs a *bona fide* sale of grain, to be actually delivered at a future time. The judgment of the district court, being without the support of any evidence, must be reversed.

STATUTE OF FRAUDS—VERBAL PROMISE OF INDEMNITY.

DERMITT v. BICKFORD.

Supreme Court of New Hampshire.

A verbal promise to indemnify another if he will become surety for a third person, in consideration of which the other does become such surety, is not within the statute of frauds.

The defendant requested the plaintiff to sign a note to one Wentworth as surety for his son, promising the plaintiff that he would see the note paid and indemnify him. The plaintiff, in consideration thereof, relying upon the defendant's promise, signed the note. The defendant moved that the court order a verdict because the agreement, not being in writing, was within the statute of frauds. The court denied the motion subject to exception. Verdict for plaintiff.

BINGHAM, J., delivered the opinion of the court:

Is the promise of the defendant within the provision of the statute of frauds, that no action shall be brought to charge any person upon a special promise to answer for the debt, default, or mis-carriage of another unless the same is in writing? Gen. Stat., ch. 201, sec. 13. The question is not new. It is old and vexatious. The authorities are not uniform. The English are hopelessly in conflict, and the American courts are in the same condition. The direct authorities are nearly equally divided. Those deciding that the promise is within the statute insist that if the surety became such solely upon the promise of the promisor, still the law raises an implied promise of indemnity by the principal from the existence of the relation of principal and surety, to which the express promise of the promisor is collateral, and, therefore, within the statute. *Easter v. White*, 12 Ohio St. 219; note to *Cripps v. Hartnoll*, 4 Best & S. 414; *Browne's Statute of Frauds*, ch. 10, secs. 158, 160, and authorities cited; *Green v. Cresswell*, 10 Ad. & El. 453.

The reasoning of the courts which hold that the promise is not within the statute is not always the same. The more common is that the promise must be made to the creditor to be within the statute; that a promise to the debtor to pay his debt to the creditor, or to a surety to indemnify him for becoming surety for a third person to a fourth, is an original and not a collateral undertaking when the promisee acts solely on the promise of the promisor. *Vogel v. Melms*, 31 Wis. 308; *Aldrich v. Ames*, 9 Gray, 76; *Alger v. Secville*, 1 Id. 391, 395; *Pike v. Brown*, 7 Cush. 133, 136; *Chapin v. Lapham*, 20 Pick. 467; *Blake v. Cole*, 22 Id. 87; *Beaman v. Russell*, 20 Vt. 205, 216; *Harrison v. Sawtell*, 10 Johns. 242; *Chapin v. Merrill*, 4 Wend. 657; *Staats v. Howlett*, 4 Dento, 559; *Barry v. Ransom*, 12 N. Y. 462, 467; *Conkey v. Hopkins*, 17 Johns. 113; *Reed v. Holcomb*, 31 Conn. 360; *Johnson v. Gilbert*, 4 Hill, 178; 3 *Parsons on Contracts*, 21, note P; *Smith v. Sayward*, 5 Greenl. 504, 507; *Tarr v. Northey*, 17 Me. 113; *Dunn v. West*, 5 B. Monroe, 376; *Thomas v. Cook*, 8 B. & C. 728; *Eastwood v. Kenyon*, 11 A. & E. 438; *Hargreaves v. Parsens*, 13 M. & W. 569, 580; *Reader v. Kingham*, 13 C. B. (N. S.) 344; *Cripps v. Hartnoll*, 4 Best. & S. 414.

These and other authorities that might be cited show that the conflict is so great, and the division so equal, that if the question were an open one a satisfactory conclusion might be difficult. But it

is not an open question in this State. We at an early day adopted the latter view of the statute, and have adhered to it. *Holmes v. Knight*, 10 N. H. 175; *Proprietors v. Abbott*, 14 Id. 157, 160; *Tibbatts v. Flanders*, 18 Id. 284; *Fisk v. McGregory*, 34 Id. 414, 418.

Judgment on verdict.

WEEKLY DIGEST OF RECENT CASES.

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1. APPEAL—FINAL JUDGMENT OF STATE COURT.

A judgment of the Court of Appeals of a State overruling a demurrer, giving defendant leave to withdraw the demurrer and to answer, and remitting the proceedings to an inferior State court to be proceeded upon according to law, does not terminate the litigation between the parties on the merits, and is not, therefore, such a final judgment as is reviewable here. *Bostwick v. Brinkerhoff*, U. S. S. C., October 23, 1882; 5 Morr. Trans., 5.

2. APPEAL—FROM SUPREME COURT OF THE DISTRICT OF COLUMBIA—PRACTICE.

1. After a term at which a final judgment on a verdict has been rendered by one justice of the Supreme Court of the District of Columbia has been adjourned without day, and an appeal taken from his judgment to the general term, but no bill of exceptions or case stated filed, a new trial can not be granted upon a case stated filed by the judge at a subsequent term. 2. When a verdict and judgment for a plaintiff have been wrongly set aside, and the error appears of record, he may, without any bill of exceptions, avail himself of it upon a writ of error to reverse a final judgment afterwards rendered against him. 3. When a judgment for a plaintiff in a personal action has been erroneously set aside, and a subsequent final judgment against him is brought up by writ of error, pending which he dies, this court will affirm the judgment in his favor *nunc pro tunc*. *Coughlan v. District of Columbia*, U. S. S. C., October 30, 1882; 5 Morr. Trans., 20.

3. APPEAL—JURISDICTIONAL AMOUNT—DISMISSAL.

A motion to dismiss an appeal as not involving \$5,000, granted, the interest of the appellant being only one undivided twentieth part of the land in controversy, and no affidavit of the value having been filed, although notice of the motion to dismiss had been served five months ago. *Parker v. Morrill*, U. S. S. C., October 23, 1882; 5 Morr. Trans., 2.

4. APPEAL—WHEN LIES FROM DECREE IN EQUITY.

1. An appeal may lie from a decree in an equity

cause, notwithstanding it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors which originate in it; but when such decrees are dependent upon the decree to execute which they have been rendered, they are vacated by its reversal; in which case the appeal which brings them into review will be dismissed for want of a subject matter on which to operate. 2. A personal decree for a deficiency, due upon a mortgage debt, remaining after execution of a decree of foreclosure and sale, is of this description; but when rendered in favor of other parties than the complainant will be reversed for the same error that required the reversal of the decree of foreclosure and sale. *Chicago, etc. R. Co. v. Fosdick*, U. S. S. C., October 23, 1882; 5 Morr. Trans., 15.

5. CONSTITUTIONAL LAW—LOCAL OPTION—REVOCA-TION OF LICENSE.

In a prosecution for violation of the local option law, the defense was that the defendant having purchased an occupation license to sell intoxicating liquors for twelve months, and, having paid the tax therefor, the State has no power by law to revoke the license; and that, if it has such power, it can only be exercised in a direct manner by a statutory enactment expressly revoking the license. *Held*, that the authorities bearing upon the question are conflicting, and it is still an open question, Willson, J., deciding, however, that the weight of authorities sustains the proposition that the legislature has full control of the subject, and can revoke occupation licenses at pleasure, and that whenever prohibition is declared in any locality, it has the effect to revoke all licenses for the sale of intoxicating liquors within that locality; Hurt, J., dissenting. *State v. Robinson*, 8 C. Tex., Austin Term, 1882; 1 Tex. L. R., 542.

CONTRACT—CHURCH SUBSCRIPTION—MATERIAL ALTERATION.

Appellant signed a church subscription list, which read: "We, the undersigned, promise to pay the following subscriptions for a new church," etc., placing \$200 opposite his name. This undertaking, though joint in form, is several, as, by placing separate sums opposite their names, it is manifest that the subscribers intended it to be several. 2. Pars. Cont. 533; 18 Ind. 137; 9 Cush. 537; Add. Cont. (3d Am. ed.) 96. Each subscriber could be sued separately without joining the others. After the list was signed, the insertion of the words, "payments to be made to John Wheeler, treasurer," constituted a material alteration of the instrument, which rendered it void. *Landwerlin v. Wheeler*, 8 C. Ind., Nov. 18, 1882.

7. CORPORATION—SALE OF ALL ITS PROPERTY—CREDITORS' RIGHTS.

A sale by one corporation of all its property to another corporation is, as against creditors not assenting thereto, fraudulent and void. *Hibernia Ins. Co. v. St. Louis, etc. Transp. Co.*, U. S. C. C., E. D. Mo., 14 Rep., 610.

8. CRIMINAL LAW—HOMICIDE—EVIDENCE THAT PRISONER WAS SUFFERING LIFE SENTENCE.

The defendant was charged with murder. He was at the time under a sentence of life imprisonment. *Held*, that the fact of his imprisonment for life was admissible for the purpose of aiding the jury in the exercise of their discretion given them by the statute, of imposing the death penalty or life imprisonment upon a finding of murder in the first degree. *People v. Hong Ah Duck*, S. C. Cal., Sept., 1882; 14 Rep., 613.

9. DAMAGES—MEASURE OF—MEDICAL MALPRACTICE.

It can not be said that \$4,500 is excessive damages where the plaintiff lost the use of both his legs through the unskillful treatment of the physician. *Kelsey v. Hay*, S. C. Ind., Nov. 22, 1882.

10. EASEMENT—ADJOINING OWNERS—RIGHT OF SUPPORT.

Purchasers of adjoining houses from a common owner are presumed to contract with reference to the condition of the property at the time of the sale, and when the house of one purchaser is supported by a wall upon the lot of the other, the right of the former to the use of the wall for the support of his house is an easement, with the enjoyment of which the owner of the lot upon which the wall stands has no right to interfere by tearing away the wall or so altering it as to injure his neighbor's house. *Henry v. Koch*, Ky. Ct. App., Oct. 3, 1882; 4 Ky. L. Rep., 252.

11. EQUITY—HUSBAND'S DEED CONVEYING ALL HIS PROPERTY TO SECOND WIFE.

Nicholas D. Broadley, in 1875, being then about seventy years of age, conveyed by deed to his second wife, all the lands he owned, about 300 acres, and all his personal property, for the expressed consideration of \$2,000, which was never paid by her, and which it was not the intention she should pay. He died in 1876. The plaintiff, Elizabeth Wood, is the only living child of said Broadley by his first marriage; and the defendant, Virginia, is the only child of the last marriage. The object of the suit is to set aside the deed, upon the ground that Broadley, when it was executed, was old and infirm, and had not mental capacity to make the deed, and that the same was obtained by an undue influence of his wife, which she had and unduly exercised over him. The issue, and only issue submitted to a jury was, "had Broadley, at the time he made the deed, sufficient capacity to make the deed?" The jury found affirmatively, which the court adopted, and judgment rendered for defendant. *Held*, that though gifts or grants of property by husband to wife are evidently bad at law, yet courts of equity will uphold them, in many cases, when they would be held bad at law; that a husband can make a reasonable provision for his wife, and though for that purpose he gives her all his property, if there is no reason to suspect fraud, it will be sustained in equity. Though the deed embraced all the husband's property, real and personal, there was no averment in the petition that the provision for the wife was unreasonable, and that the deed stands good whether the consideration expressed was the real consideration or not, in the absence of evidence to establish such undue influence or other grounds upon which it is assailed. *Wood v. Broadley*, S. C. Mo.

12. EVIDENCE—SECONDARY EVIDENCE TO ESTABLISH WRITTEN CONTRACT.

1. Ordinarily the existence of a written contract, alleged to have been lost, or not in the possession of the party attempting to enforce it, and when not in his power to produce, it must be established by the attesting witnesses, if any, or if not, by those who saw the contract, and were either present when it was entered into, or recognized the handwriting of the parties to it after it had been executed and delivered. 2. Contents of a writing may be established by secondary evidence, where it has been trusted or traced to the possession of a party interested in suppressing it, and—

If such party fails or refuses to produce it, every intentment and presumption is to be made against him, as he might remove all doubt on the question by producing the writing. *Benjamin v. Ellinger*, Ky. Ct. App., Oct. 26, 1882; 4 Ky. L. R., 317.

13. FRAUDULENT CONVEYANCES—FRAUDULENT INTENT ON PART OF GRANTEE NOT INDISPENSABLE.

1. Under the present statute against fraudulent conveyances, it is not necessary to allege or prove that the grantee acted with the intention to aid his vendor in the fraud. He will not be protected if he had notice of the fraudulent intent of his grantor. 2. An attorney who accepts from his client a conveyance, pending a suit against him, made with the intention of preventing his adversary from collecting his debt, is affected with notice of the fraudulent intent of his client, regardless of any intention on his part to aid in the perpetration of the fraud. 3. It was sufficient to put the grantee upon inquiry, that the grantor had the land received in exchange deeded to his wife. *Summers v. Taylor*, Ky. Ct. App., Oct. 10, 1882; 4 Ky. L. J., 290.

14. FRAUDULENT CONVEYANCE — MERGER OF EQUITY OF REDEMPTION FRAUDULENTLY CONVEYED.

When a mortgagor conveys the mortgaged property to the mortgagee with the intent to defraud his creditors, and the conveyance is set aside because of the fraud, the mortgage is not merged, but remains, and may be enforced. The mortgagee will be regarded as holding the legal and equitable titles separately, if his interest requires such severance. *First Nat. Bank v. Essex*, S. C. Ind., November 18.

15. HUSBAND AND WIFE—ABATEMENT OF ACTION AGAINST—DEATH OF WIFE.

Where husband and wife are jointly sued for the wrong of the wife, and the wife die, the action abates. *Roberts v. Lisenbee*, S. C. N. C., 1882; 1 Am. L. Mag., 318.

16. HUSBAND AND WIFE — EFFECT OF WIFE'S SIGNATURE TO NOTE—SUFFICIENT CONSIDERATION.

On June 8th, 1879, one Stonebraker and the defendant, Jansen, executed a note to the plaintiff, Williams, due three months after date, on which this suit is brought. About the time of the maturity of the note, Williams agreed with Stonebraker that if he would get his wife to sign the note he would extend the time of payment to August 1, 1879. Williams knew that Jansen, who signed the note as a joint maker, was surety only, and Jansen did not know at the time that Mrs. Stonebraker had signed the note, or that Williams had agreed to extend the time of payment, and he never consented thereto. Judgment was given for the defendant. *Held*, that as the wife's signature imposed upon her no liability whatever, being in contemplation of law a nullity, the responsibilities of the parties to the note were in no way increased or diminished, or otherwise changed by the addition of the name thereto. See *Cushing v. Field*, 10 Reporter, 334. If she had capacity to contract by reason of a separate estate, the burden was on the defendant to show it; and *held, further*, that the obtaining the wife's signature, though such signature be of no value to Williams, constitutes a sufficient consideration for the agreement to extend the time of payment. *Lindell v. Rokes*, 60 Mo. 250; *Haigh v. Brooks*, 10 Ad. & El. 309; *Brooks v. Ball*, 18 Johns. 337; *Clark v. Sigourney*, 17 Conn. 581. *Williams v. Jansen*, S. C. Mo.

17. HUSBAND AND WIFE—EQUITY JURISDICTION WHERE WIFE IS UNWORTHY.

A deed from husband immediately to wife, conveying the whole of his real and personal property, will not be upheld in equity where the wife is shown to be unworthy of the interference of the court by reason of being an adulteress; or where the provision for the wife, as here, is extravagant and exhaustive of the husband's estate. *Warlick v. White*, S. C. N. C., 1882; Am. L. Mag., 350.

18. LANDLORD AND TENANT—IMPLIED RENEWAL—TENANT HOLDING OVER.

Upon the question of an implied renewal of a tenancy all the terms of the former lease must be considered. Hence, if a landlord elect to treat one holding over as a tenant, he thereby affirms the form of tenancy under which the tenant previously held. *Hollis v. Burns*, S. C. Pa., October 2, 1882; 39 Leg. Int., 421.

19. MASTER AND SERVANT—NEGLIGENCE—INFANCY—MECHANICAL APPLIANCES.

The infancy of an employee does not of itself give him a cause of action against his employer for setting him at dangerous work, if it appears that he was of average intelligence, that his duties were explained to him when he entered upon the employment, and that he had in mind its dangers and the purpose to avoid them. There is no breach of duty in employing a servant subject to the ordinary risks of the employment if the servant himself is aware of the risks and consents to encounter them. An employer is not bound to make use of the newest mechanical appliances for the purpose of insuring the safety of his employees, especially if it does not appear that on the whole it would be advantageous to them. So, a railway company is not bound to block its frogs, particularly if it does appear that in so doing it would not entail greater dangers than it would avert. *McGinnis v. Canada Southern Bridge Co.*, S. C. Mich., October 31, 1882; 13 N. W. R., 819.

20. NEGOTIABLE PAPER—UNCERTAINTY—BONA FIDE HOLDER.

As the instrument sued upon in this case as a negotiable promissory note contains a provision whereby the amount to be recovered may be rendered uncertain, it can not be sustained as a negotiable note; and as the matters set up in the answer would be a good defense in an action between the original parties, this defense will avail against a bona fide holder of such instrument by indorsement. *Smith v. Mariand*, S. C. Iowa, October 21, 1882; 13 N. W. R., 832.

21. SET-OFF—CLAIM NOT DUE WHEN PROCEEDINGS WERE INSTITUTED.

It is necessary that a note sought to be used as a set-off should be due and owing to the defendant at the time that the original action was brought, and a note, therefore, which is purchased by the defendant upon the plaintiff after the original suit was commenced, can not ordinarily be pleaded as a set-off. *Reynolds v. Thomas*, S. C. Kan., Nov., 1882; Judge's Headnotes.

22. STATUTE OF FRAUDS—LIABILITY OF ANOTHER.

Contractors to build a railroad agreed with merchants to pay orders and time checks issued by a subcontractor to his employees. Upon the faith of this agreement, and giving credit exclusively to the contractors, the merchants accepted and received such orders and time checks in exchange for goods. *Held*, that the promise of the con-

tractors was not within the statute of frauds. *West v. O'Hara*, S. C. Wis., Oct. 31, 1882; 13 N. W. R., 894.

23. TAXES—RECOVERY OF TAXES PAID—VOLUNTARY AND INVOLUNTARY PAYMENT.

A payment of taxes is not compulsory, when it is not made under any duress of person or goods, or under any impending danger of seizure or sale of property; or where, before a warrant directing a levy can be issued, the party against whom the tax is charged is entitled to a day in court. Where there is a compulsion, actual, present, potential in inducing the payment by force of process available for instant seizure of person or property, and the demand is really illegal, there the party by giving notice of the illegality and his involuntary payment, can recover back the money so paid. Where the payment is voluntary, as in this case, a protest with notice of an intent to reclaim, is not sufficient to sustain a recovery. The voluntary character of the payment still remains, notwithstanding the notice, and is fatal to the action. *Peebles v. Pittsburgh*, S. C. Pa., Oct. 25, 1882; 13 Pittsb. L. J., 128.

24. WILL—PRECATORY TRUST.

A testator gave the whole of his property, real and personal, to his wife, "feeling confident that she will act justly to our children in dividing the same when no longer required by her." *Held*, an absolute gift to wife. *Mussoorie Bank v. Raynor*, Eng. P. C.; 81 W. R., 17.

LEGAL EXTRACTS.

THE USE OF AN OATH.

The *North American Review* is discussing a question which recent events in England and France have brought to attention—the expediency of abolishing the oath in judicial proceedings and official qualification. The argument in favor of this change, which is pressed with much ability, ingenuity and force, may be summed up briefly in the propositions that an honorable or conscientious man will testify truly without an oath; a dishonest man will testify falsely if he wishes to in spite of it; and that as it is a device for introducing into legal proceedings a religious act which is discredited by some and despised by others, and often performed in a way to shock the sensibilities of those who credit and respect it, it must be regarded as both useless and obnoxious.

We doubt whether men of experience in judicial affairs will be able to accept the dilemma which is thus so ingeniously put. The question of the oath as a qualification for official responsibility and power stands upon somewhat different principles, and may require somewhat different opportunities of observation to judge wisely of it. But in respect to the use of an oath for a witness, it would probably be found that the men who are most accustomed to deal with witnesses, to examine them, to cross-examine them, or to sit either on the bench or in the jury box, and scrutinize their testimony, would put the question somewhat differently. It is true, in a certain

sense, that a liar will testify falsely if he chooses to, in spite of an oath; and so it is true that a rogue will cheat, and a professional criminal will rob and murder, in spite of laws, and that an honest and upright man would do neither, though there were no laws. But, making all allowances for the degree of rough truth there may be in such generalizations, there is a large class of people with whom the existence and probable administration of the law is sufficient to turn the scale the one way or the other. We are inclined to think that the mass of mankind, in the present state of civilization and morality, occupy this middle ground. The degree of intelligence and morality which they possess, *plus* the sanctions of the law, are, together, sufficient, when either one alone might not be sufficient, to lead them to resist all ordinary temptations; and, on the other hand, with the criminal classes, in whom self-restraint is at the lowest degree, the existence and probable administration of the law is doubtless sufficient to lead them to refrain from many slight and trivial temptations, although defied at the impulse of strong and inviting opportunities. In other words, men who will go wrong if they choose, in spite of the law, do not choose to go wrong quite so often—perhaps not nearly so often—as they would were it not for the law.

If our reformers could see into the minds of witnesses as they are brought to the stand, we apprehend that in a majority of cases—and such experience as we have had would lead us to believe it would be in the vast majority of cases—it would be seen that in the conscience of the witness there is usually something about the oath which makes it more difficult to testify falsely than if none were administered. It is not impossible that the majority of witnesses would be unable to explain the reason. It is very likely that explanations, if attempted, would be unsatisfactory to the philosophers, and might be regarded either as illogical or superstitious, or both. But when we wish in a tangled mass of contradiction and passion to restrict human testimony to the truth, it is necessary to be practical and to deal with the minds which are to afford the testimony in a manner appropriate to the desired result.

The great obstacle which the practitioner finds in hotly litigated cases, and the principal hindrance to the fair administration of justice, at any rate in large cities, is in the degree to which men are willing to testify falsely and to take their risk of being troubled by a charge of perjury. We apprehend that in the present state of the general mind, if it were the usage simply to tell witnesses that they must tell the truth or they would be liable to prosecution and imprisonment in case it could be proved beyond a reasonable doubt that they told a falsehood, the proportion of interested witnesses who would regard it as a fair alternative—a situation in which they were entitled to mislead if they were willing to take the risk—would be uncomfortably large. We imagine that if any of the advocates of the abolition of the oath

were going to trial with a case of his own, in which passions and interests were strongly concerned, he would be very reluctant, while the oath was administered to him and his own witnesses, to allow his adversary and his adversary's witnesses to testify without an oath upon the simple admonition that if they were not careful they might be prosecuted. If he were required to submit to this deprivation of the oath upon his adversary, the bystanders would not be surprised to hear some extra-judicial oaths.

To show that the time has arrived for the abolition of the oath, it should appear either that teachers of religion and morality have made sufficient progress in the inculcation of truthfulness that individuals taken from the community at random will be found conscientiously as truthful without it as with it; or that skeptics and free-thinkers shall have made sufficient progress in convincing the world that there is no moral or religious significance in an oath, that individuals taken at random from the community will find no more difficulty and no more cause for hesitation in a purpose of deception by means of a false oath, than in an ordinary conversation on business.

If the discussion of the question should lead the courts and officers upon whom the administration of oaths devolves, to perform this duty in a more fitting and decent manner, so long as oaths shall continue to be required, the discussion will not be without good effect meanwhile.—*New York Daily Register*.

RECENT LEGAL LITERATURE.

THOMPSON AND MERRIAM ON JURIES. A Treatise on the Organization, Custody and Conduct of Juries, Including Grand Juries. By Seymour D. Thompson and Edwin G. Merriam. St. Louis, Mo., 1882: William H. Stevenson, Law Publisher and Publisher of CENTRAL LAW JOURNAL.

The rights of *habeas corpus*, trial by jury, and other venerable muniments of personal liberty and property, are so familiar to us in these "piping days of peace," that we take as little cognizance of their value as we do of the air we breathe. Their importance, however, is not lessened by the comparatively infrequent occurrence of notable occasions for their use as safeguards of life, liberty and property. After the unexpected result of the "star-route" indictments, the value of trial by jury was, for a season, seriously impugned by the newspaper press, and some people, who ought to have known better, rashly inferred that the time-honored institution had outlived its usefulness. One swallow, however, does not make a summer, and a single failure of justice, if it be such, can not affect an institution which has withstood the storms of State for a thousand years.

Without entering upon the question whether

trial by jury be a less valuable privilege now than formerly, it is very safe to say that it is and will be, as much as at any former period, an important factor in the administration of justice, civil and criminal, and the laws by which it is regulated, are worthy of the most diligent study of the profession.

Of these laws an admirable compendium will be found in the work the title of which stands at the head of this article. Of the authors, one is well known and highly appreciated by the profession, and the other no less deserves to be. They have evidently bestowed upon this book a vast deal of careful and intelligent labor, and the result is seen in a work comprehending all the learning on the subject, admirably arranged and thorough and complete in all its details. Art. II. of Chapter XI., treating of the "prejudice, bias and opinions" of jurors as a cause of challenge, and as affecting their competency, is particularly well worked out, and furnishes in compact form the law upon a most critical subject on which the advocate must necessarily act "on the spur of the moment." Indeed, it may be said that the greatest value of the work is, that it is emphatically a book for practice, furnishing authority that can not elsewhere be found, except by consulting dozens or scores of volumes. When to this it is added that the questions which this book solves generally arise without warning and are decided by the court without delay, it is apparent that it supplies a want that must be seriously felt by every practitioner who appears before juries either in civil cases or criminal.

The criminal lawyer especially, will find this work in the highest degree useful. His practice is chiefly before juries, and questions involving the legality of their composition or action arise far more frequently in criminal than in civil cases. To him the whole law of juries, grand juries and petty juries, in a single volume, is surely invaluable.

The diligence of the learned authors has not failed to furnish the various modifications of the common law made by statute and judicial decision in the different States; and, in fact, nothing has been left undone which could render the book useful to the profession and creditable to its authors.

CONTRACTS OF MARRIED WOMEN. A Treatise on the Law of Contracts of Married Women. By John F. Kelly. Jersey City, 1882: F. D. Linn & Co.

The importance and difficulty of the subject discussed in this volume are familiar to every lawyer. The natural difficulty and intricacy of the topic, inherent in it, are considerable, even in the purity of the common law; but they have been immeasurably increased by the process of development which, for the last half century, it has been undergoing in the courts, as well as in the halls of legislation. Many conflicting decisions and inartificial

worded statutes are to be reconciled with each other and the dictates of common sense before satisfactory results can be attained. The work before us deals with the difficulties of the topic in a thoroughly practical and somewhat original manner. The early chapters (I. to VIII. inclusive) treat of contracts of married women generally, without reference to the regulations of local statutes or the peculiarities of local decisions. The later chapters (IX. to XLVI. inclusive) are each devoted to the peculiarities of State legislation, and the construction it has received in court. The work is carefully and accurately done, and the citation of authority seems particularly thorough and exhaustive. Our readers are doubtless familiar with the author's method and style of work from the numerous able articles which he has from time to time contributed to these columns. The mechanical execution of the work is exceptionally good and creditable to the enterprising house by which it is published.

NOTARIES' MANUAL. The Notaries' Manual, Containing Full Instructions as to their Powers, Rights, Duties and Liabilities under Missouri, Kansas, Texas and Federal Laws, together with all Necessary Forms, including Forms for taking Depositions and Acknowledgments under the Laws of all the States and Territories. By Benjamin F. Rex. St. Louis, Mo., 1882: The Gilbert Book Company.

This convenient little volume is a compendium of all the law, common as well as statutory, relating to the official rights, duties and liabilities of notaries public in the States of Missouri, Kansas and Texas, treating at length the subjects of Depositions, Protest and Notice, and the Acknowledgment of Deeds, including appropriate forms and an exhaustive and accurate citation of authority. Its practical utility, not only to the officers to whose needs it is specially addressed, but also to real estate agents, bank officers and legal practitioners, is manifest. The work is conveniently and logically arranged, and the citation of authorities is abundant and accurate.

NOTES.

—The sentence of death has just been passed by a criminal court in France against a man named Fourquin for the crime of arson. Fourquin is an incendiary of a very peculiar type. He was corporal in the Fire Brigade, and always bent the idea of obtaining the cross of honor, or, at a medal for saving life. To accomplish this feat, he had set fire to thirteen houses during the last few years. As soon as the alarm was given, he would hasten to put on his fireman's uniform, and never faltered before any danger to save

lives. Fourquin ended, however, by being caught in the act of committing his fourteenth offense in a barn, and was arrested, and found guilty as above.—*Translated from L'Argus.*

—"I do not think that glibness and self-confidence exhibited early in court are a good augury for ultimate success. No one, until he has measured himself with others, has a right to form a high opinion of himself. It is true that after a young barrister has ejaculated with difficulty a few incoherent words, he sits down with a parched throat and a sort of sickening feeling that he will never succeed; but the most successful of advocates have experienced these sensations, and to this day I believe that many rise to conduct cases of importance with some of their old emotions. When I made my first forensic display, the occasion was not an important one, nor productive of much profit. I rose, but could see nothing. The court seemed to turn round, and the floor to be sinking. I can not tell what I asked, but it was graciously granted by the bench. These were my sensations when first I was called upon to address the court, and it was long before I could do so with any amount of confidence."—*Sergeant Balandine.*

—The following is a *verbatim* extract from a report of a wife-beating case in one of the London police courts the other day:—John Smith, witness for prosecution, is under examination. "Now, what do you know of the matter, Mr. Smith?" "I know everything. I seed Brown beat his wife." "How did he beat her?" was the text of the question put by the magistrate. "How did he beat her?" exclaimed the witness with a look of scorn, "How would you beat your wife?" This to the worthy magistrate, who desired the witness to answer the question. "Well," at length said the witness. "Brown uses his boots, as I never do. I only uses my flats. I have often told him those here boots would get him into trouble." The worthy Smith was immediately turned out of the court by order of the magistrate.

—Arabi's counsel, Mr. A. Meyrick Broadley, is a member of the English bar of several years' standing. He was called to the bar at Lincoln's-Inn in Trinity Term, 1869, and is now an advocate at the Consular Court at Tunis.

—During the legal absence of Mr. (afterwards Lord) Campbell on his matrimonial trip with the *ex-dévant*, Miss Scarlett, Mr. Justice Abbott observed, when a cause was called on in the court of King's Bench: "I thought, Mr. Brougham, that Mr. Campbell was in the case." "Yes, my lord," replied Mr. Brougham, with that sarcastic look peculiarly his own; "he was, my lord, but I understand he is ill." "I am very sorry to hear that," said the judge. "My lord," replied Mr. Brougham, "it is whispered that the cause of my learned friend's absence is the scarlet fever."